(6)

No. 04-15

IN THE

Supreme Court of the United States

AT&T CORP., *et al.*,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

The Solicitor General correctly states (SG/FCC Br. 7-8, 24, 26) that the D.C. Circuit's decision in this case (and its earlier decision in *USTA I*) imposed requirements on the FCC "that go beyond those found in the [1996] Act itself" and that conflict with ("are in tension with") this Court's decisions in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), and *Verizon Telephone Cos.* v. *FCC*, 535 U.S. 467 (2001). In particular, these D.C. Circuit decisions adopted the view of the Act that was expressed in Justice Breyer's separate opinion in *AT&T* and his dissenting opinion in *Verizon* and that was rejected by the majority of this Court: that it inherently inhibits investments and "inflict[s]" other serious "costs" on the national economy to allow competitive telephone carriers to lease network elements from incumbents at rates set under the FCC's TELRIC standard. See Pet. 6-7.

This view was the essential premise for both sets of holdings that the CLEC petitioners challenge. Because it viewed unbundling as presumptively harmful, the D.C. Circuit required the FCC to satisfy a series of extraordinary extrastatutory requirements before it can require the unbundling of any element, and the court vacated the FCC's national impairment findings for "narrowband" switching and transport because the FCC had not met these requirements. Correlatively, again because it viewed unbundling as presumptively harmful, the D.C. Circuit applied an extraordinarily lax standard in reviewing the FCC's decision to end unbundling of broadband capabilities of bottleneck local loop facilities. It held that these rules are justified by the FCC's suggestion that eliminating competition may foster greater investment by incumbents (and the court did not even require findings that this "benefit" would in fact result).

The Solicitor General and FCC have nonetheless joined the incumbents (ILECs) in opposing review of both sets of

questions raised in the CLECs' petition for certiorari. The SG/FCC oppose review of questions 1 and 2 – which challenge the legal standard the D.C. Circuit applied in upholding the rules that ended unbundling of broadband capabilities of bottleneck local loop facilities – on the ground that these purportedly involve no more than fact-bound applications of the 1996 Act. As explained below, that is wrong, and the only way the SG/FCC and ILECs can advance their contrary claims is by ignoring the primary argument advanced in the petition: that it is antithetical to *AT&T*, *Verizon*, and the Act's terms, structure, and purposes to end unbundling of bottleneck facilities on the ground that duopoly or monopoly may lead to greater investment by incumbents. This is a fundamental question of law to which the SG/FCC and the ILECs have no answer.

The SG/FCC also oppose review of questions 3 and 4 – which challenge the legal standards the D.C. Circuit applied in vacating the "narrowband" rules – on the ground that the FCC has not itself sought review of the vacatur but has decided to adopt new rules in the next six months. If this were a sufficient reason to deny review, it would mean only that a grant of certiorari should be limited to the first and second questions that have been raised. However, as explained below, the FCC's failure to seek review poses no insuperable obstacle to review of questions 3 and 4. The fundamental issue raised by these questions – whether extrastatutory requirements may be imposed to mitigate putative harms of unbundling – is independent of the specific rules that the FCC adopts and will recur regardless of the specific action that the FCC takes on remand. In this regard, the government's failure to challenge a ruling that it acknowledges is erroneous does not insulate the decision from review; this Court has granted review in this circumstance where, as here, there are compelling reasons to do so. See *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 126 (1991).

I. QUESTIONS 1 AND 2 AND THE BROADBAND RULINGS SHOULD BE REVIEWED.

1. In light of the ILECs' misstatements (ILEC Br. 25-26), it is necessary to reiterate the grounds on which the D.C. Circuit upheld the FCC's broadband unbundling rules. These rules deny CLECs access to a quintessential natural monopoly facility that the FCC found cannot be replicated: the wires (local loops) that connect each home and business to the telephone network. App. 326a-340a, 342a-364a (¶¶ 255-269, 273-297). CLECs thus have provided broadband service by leasing loops from ILECs and connecting the loops to CLEC-owned packet switches and associated data transmission facilities that represent billions of dollars of investment.

The FCC therefore found that competitors will be impaired if they are denied access to the broadband capabilities of the hybrid copper-fiber loops. Under the FCC's impairment standard, this is a finding that CLECs will likely be altogether precluded from providing broadband service in the future if access to the loops is denied. Pet. 7. And while the FCC ostensibly found a lack of impairment when competitors are denied access to all-fiber loops (FTTH) and to the high-frequency portion of all copper loops ("line sharing"), these findings were so plainly flawed that the D.C. Circuit did not accept them. App. 44a (finding "convincing" the CLEC objection to FCC claim that CLECs were not impaired with respect to all-fiber loops) & 46a (assuming "some impairment" without line sharing).

Thus, the D.C. Circuit upheld these rules *not* on the ground that there was no impairment, but on the ground that the FCC had identified benefits from ending unbundling that purportedly outweighed the benefits of competition. It held that ending unbundling was justified by the FCC's assertions that the elimination of local competitors would allow the incumbents to earn enhanced returns and that the prospects of enhanced returns could incent incumbents to make greater broadband investments in their loop and other facilities. App.

39a-40a; *see* App. 341a-342a (¶ 272). The D.C. Circuit acknowledged that this rule could lead to a cable TV-ILEC duopoly (and an ILEC monopoly in areas where there is no cable modem service). App. 41a. In this regard, while the D.C. Circuit agreed with the FCC's claims (shown to be baseless below) that the uncodified § 706 of the 1996 Act supported the FCC's actions, the court held that the policy of promoting investment would have justified this result even if § 706 did not exist. App. 36a-37a.

It is undisputed that this holding has great economic importance. Its effect is to eliminate competition for broadband services that are used by tens of millions of consumers today and that are the future of telecommunications. Pet. 1-2, 14-15.

2. To oppose review, the SG/FCC and the ILECs have thus taken a different tack. They assert that the CLECs' challenges raise no fundamental legal questions, but only "a fact-bound application of Section 251" (SG/FCC Br. 16) or a "fact-bound issue" under the Administrative Procedure Act. ILEC Br. 28. This is nonsense. The CLECs have raised a fundamental legal question: whether it is contrary to the terms, structure, and purposes of the 1996 Act (and to *AT&T* and *Verizon*) to end unbundling of a bottleneck facility in the face of a finding of impairment on the ground that eliminating local competition (and creating a duopoly or monopoly) may lead to greater investment by the incumbent.

Indeed, the only way that the SG/FCC and the ILECs can argue otherwise is by assiduously ignoring the legal arguments and positions set forth in the CLECs' petition. It set forth in detail the provisions of the Act and the holdings of this Court that foreclose the FCC's and the D.C. Circuit's conclusions. Pet. 15-22. The SG/FCC and the ILECs do not even acknowledge, much less attempt to refute, these points.

The CLECs demonstrated that the FCC's view that monopoly or duopoly will better promote the public interest is

flatly inconsistent with this Court's recognition in *Verizon* that the Act makes the creation of local competition both an "end in itself" and a means of fostering competition in long distance markets and is also inconsistent with the principle that a statute cannot be construed to destroy itself. Pet. 17-19. They demonstrated that the Act preserves the ILECs' incentives to make innovative investments in bottleneck facilities not by protecting ILECs from competition, but rather by providing for cost-based network element rates that fully compensate the incumbents for all the risks they incurred in making investments. Pet. 18 (citing *Verizon*, 535 U.S. at 517-22). They demonstrated that the FCC's and the D.C. Circuit's construction of the "at a minimum" clause of § 251(d)(2) is foreclosed by the Act's structure and purposes, and especially by the provision of § 10 that expressly bars the FCC from eliminating an unbundling requirement based on the findings and grounds that were advanced by the FCC and found sufficient by the D.C. Circuit. Pet. 21 (citing 47 U.S.C. § 160(a) & (d)). And they demonstrated that the D.C. Circuit's holding is fatally inconsistent with *AT&T's* holding that the "impairment" is the focal point of any unbundling determination. *AT&T*, 525 U.S. at 391-92.

The failure of the SG/FCC and the ILECs to respond to *any* of the foregoing arguments is vivid confirmation that CLECs' legal claims are not only substantial, but also unanswerable.

The SG/FCC and ILECs do attempt to defend the D.C. Circuit's conclusion that the uncodified § 706 supported the FCC's broadband rules. But here, too, the SG/FCC and the ILECs refuse to acknowledge the factor that foreclosed the FCC's reliance on § 706. While § 706 does indeed direct the FCC to attempt to foster investment in broadband infrastructure, it prescribes that any such actions *also* foster local competition. As the petition demonstrated (p. 22), the FCC expressly acknowledged this point in the *Order* (App. 253a-254a (¶ 177)), stating that § 706 itself would not authorize the elimination of broadband unbundling and thus

ultimately relying on the view (refuted above) that the "at a minimum" clause of § 251(d)(2) allowed the FCC to treat the 1996 Act as authorizing actions that end local competition, rather than promote it, in the name of incenting ILEC investment.

3. The CLECs' petition also pointed out an additional fallacy of the D.C. Circuit's holding. Because of the D.C. Circuit's view that leasing network elements at TELRIC rates is presumptively harmful – even when there is impairment and CLEC competition would otherwise be foreclosed – the D.C. Circuit allowed the FCC to end access to bottleneck loop facilities without there having been any finding (or any substantial evidence) that greater investment by ILECs or other benefits would in fact result. The D.C. Circuit's view is that it was enough that the FCC had made "suggest[ions]" to this effect based on self-serving ILEC claims. App. 39a-40a. But even if it were permissible to end unbundling in the face of impairment for the purpose of incenting investment by ILECs, the law requires a finding based on substantial evidence that the benefit of greater investment will in fact occur. The Act does not adopt a presumption against unbundling when impairment exists.

However, contrary to the suggestions of the SG/FCC and ILECs, the CLEC petitioners are not asking this Court to review the facts relating to the narrow FCC "determinations" relating to ILEC incentives to deploy "electronics" in hybrid copper-fiber loops. Rather, the CLECs are asking that the Court grant certiorari, correct the D.C. Circuit's misapprehensions of the Act, and remand so that the D.C. Circuit can review the FCC's rules and determinations under a correct legal standard.

II. QUESTIONS 3 AND 4 AND THE NARROWBAND RULINGS SHOULD ALSO BE REVIEWED.

1. The SG/FCC correctly state (p. 24) that the D.C. Circuit's vacatur of the FCC's narrowband switching and

transport rules rests on extrastatutory grounds that are contrary to *AT&T* and *Verizon* and to settled principles of administrative law. But it opposes review on the ground that the FCC has not sought certiorari and reinstatement of the vacated rules, but is endeavoring to adopt new rules in six months time. Similarly, the ILECs assert that the FCC's failure to seek review absolutely bars this Court from granting review of questions 3 and 4 of the CLECs' petition and requires that any grant be limited to the questions 1 and 2.

But the ILECs are wrong this Court cannot or does not review erroneous decisions that are adverse to an agency if the government does not seek review. This Court has made clear that it will not defer "'mechanically'" to the United States' refusal to defend a ruling. *Lawrence ex rel Lawrence* v. *Chater*, 516 U.S. 163, 170-71 (1996) (per curiam). To be sure, the government does not ordinarily refuse to challenge a court of appeals' decision that contravenes congressional intent on a legal issue of national importance. But, where it does, this Court has granted review over the opposition of the Solicitor General and the federal agency. *See Norfolk & W. Ry.*, 499 U.S. at 126 & n.2.

In *Norfolk & Western*, the D.C. Circuit had rejected the federal agency's decision regarding the scope of its authority under a congressional statute and remanded for further proceedings. The Solicitor General and the Interstate Commerce Commission opposed the private parties' petitions for certiorari, arguing that review was "premature" and should be denied because ongoing proceedings would address "alternative bases—left open by the court of appeals' decision." Brief for the Federal Respondents in Opposition at 11-12, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (Nos. 89-1027, 89-1028); *id.* ("the Commission's ultimate disposition of the case on remand may not be affected by the court of appeals' present decision"). The SG/FCC make the same basic argument here, contending that review is unwarranted because the FCC intends to "adopt

new rules in light of the requirements specified by the D.C. Circuit," and "the court of appeals did not purport to apply the statutory impairment standard conclusively to particular facts." SG/FCC Br. 25, 27. But because there were compelling reasons to review the erroneous court of appeals decisions vacating the agency order, the Court granted review in *Norfolk & Western Railway* despite the opposition of the SG and the ICC (who then filed merits briefs in support of the private petitioners, 499 U.S. at 118, as the SG/FCC undoubtedly would here as well).

2. There are here compelling reasons to review the D.C. Circuit's fundamental grounds for vacating the FCC's national impairment findings for mass market switching and transport: its erroneous view that the FCC must satisfy extrastatutory requirements to narrow the scope of unbundling to the minimum necessary. This is not, as the ILECs suggest, a "run-of-the-mine" case in which the government declines to defend an agency position because it concluded, upon further review, that its rules were erroneous. Rather, the Solicitor General and FCC now state (1) that the decision below striking down the agency's narrowband unbundling rules was erroneous, (2) that the court below imposed extrastatutory obligations that were contrary to congressional intent and this Court's decisions, and (3) that avoidance of further uncertainty is essential "for consumers and the communications industry as a whole." SG/FCC Br. 24-26.

Here, the only way to eliminate or minimize uncertainty is to grant review of these issues now. The reality is that the fundamental issue presented in this case – the correctness of the D.C. Circuit's view of the Act – will recur regardless of what specific rules the FCC adopts on remand.

On the one hand, if the FCC were to readopt its national unbundling requirements for mass market switching and transport, these rules will again be reviewed by the D.C. Circuit which again will ask if the FCC has made all the

extraordinary extrastatutory findings that, in the D.C. Circuit's view, are necessary before presumptively harmful unbundling can be ordered even in the face of overwhelming evidence of impairment. In this regard, after the FCC adopted interim rules that do no more than preserve the status quo for six months, the ILECs filed a petition of mandamus in the D.C. Circuit asking that the interim rules be vacated as inconsistent with the D.C. Circuit's mandate in the decision below and seeking orders that would bar states from exercising their express state law authority to maintain unbundling requirements. *See* ILEC Br. 13 n.11.

On the other hand, if the FCC were to adopt final rules on remand that narrow the scope of unbundling or that end it in some circumstances in an attempt to satisfy the D.C. Circuit, it would simply create a basis for CLECs to challenge the FCC's Order and the correctness of the D.C. Circuit's view of the Act (in the same way CLECs have challenged the elimination of unbundling for broadband capabilities of loops). The issue is thus certain to recur.

Further, to prolong the uncertainty will have significant consequences for consumers and competition. Because AT&T has found the uncertainty intolerable, it has already announced that it will cease to market local telecommunications services to residential customers. If the uncertainty about the validity of the D.C. Circuit's view of the Act is prolonged, other CLECs will take similar actions, with adverse consequences for the consumers, competition, and the 1996 Act alike.

Finally, if the Court grants review of the broadband rulings, it will inevitably be addressing the issue raised in question 3 of the petition and the fundamental ground for the D.C. Circuit's narrowband rulings. All these rulings of the D.C. Circuit are based on the same premise: that this Court "implicitly" adopted the view set forth in Justice Breyer's *AT&T* concurrence and *Verizon* dissent that unbundling is harmful even when there is impairment and that the FCC thus

must take extraordinary steps to narrow it. Because the Court will be inevitably addressing the D.C. Circuit's view of the Act if it reviews the broadband rulings (questions 1 & 2), it will then be logical formally to review the fundamental narrowband ruling (question 3) as well.

2. There is also reason now to review the D.C. Circuit's holding that states cannot be delegated authority to make impairment determinations (question 4). As the CLECs have shown, this holding conflicts with *Batterton* v. *Francis,* 432 U.S. 416, 423 (1977), and with *Wisconsin Department of Health & Family Services* v. *Blumer*, 534 U.S. 473, 495 (2002). The SG/FCC does not defend the D.C. Circuit, but states that review is "premature" because the decision below is "not in conflict with any other judicial decision specifically addressing the Act." SG/FCC Br. 25-26. However, as the SG and FCC have explained previously to this Court, when a case arises "on direct Hobbs Act review of FCC rules . . . it may present the only opportunity for any court to address the issues presented." Petition for a Writ of Certiorari at 17-18, *FCC* v. *Gulf Power Co.*, 531 U.S. 1125 (2001) (No. 00-843). More to the point, the lower court's decision is not based on its understanding of the Communications Act, nor is its effect so limited. Rather, it is based on the legal holding that even in statutes of cooperative federalism delegation to states is lawful only when expressly authorized by the Congress. That holding cannot be squared with *Batterton* and *Blumer.*

CONCLUSION

For these reasons, and those set forth in the petition, a writ of certiorari should be granted either on all questions presented or limited to questions 1 and 2.

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